Office - Supreme Court, U. S.
JAN 3 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

Nos. 598 and 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF

and

MOTION SUGGESTING A DIMINUTION OF RECORD

MEYER ABRAMS,
GERSH I. MOSS,
Counsel for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

INDEX.

PAGE

REPLY TO STATEMENT OF FACTS 1

REPLY TO ARGUMENT 3

SUMMARY OF ARGUMENT:

1. The petition raises questions of public or general interest 3-5
2. The decisions sought to be reviewed are in conflict with decisions of other circuits and with the decisions of the court 5-6
3. The decision of the Special Court that it had jurisdiction to determine the disposition of the dividends cannot be sustained under any theory 6-9
4. Petitioner has certified the record as made up by the respondents, and the record is sufficient to present the jurisdictional question 9-10
5. The decision of the Fourth Circuit that this court was vested with the exclusive jurisdiction under Chapter XV affects federal appellate procedure generally 10

MOTION SUGGESTING DIMINUTION OF RECORD 11

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

Nos. 598 and 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY

The Complete Restatement Is Inaccurate and Misleading.

Respondents say (p. 2) that a "complete restatement" was "necessary" because there "are so many inaccuracies" in petitioner's statement. On page 3 they point to an alleged inaccuracy and say:

> "The statement on page 11 of Petitioner's Brief that: 'There was nothing in the Plan pertaining to this question,' *i.e.*, the question involving the merits of the issue being presented to this Court, is inaccurate."

The quotation: "there was nothing in the Plan relating to this question" *did not refer to the extension* under the Plan *or to the change* in the interest payments under the Plan which were the *"defaults"* cured by the Plan but *it referred to the question* "whether the Trustee should pay over the dividends to the B. & O. because of the decrease in the capital and surplus of the Reading Company." That such a question was not presented by the Plan can best be shown by the Plan to which *they* refer (p. 3) as Exhibit 7 (Case Number 625 in this court). Counsel were unable *to point out anything in that Plan dealing with the subject matter of distribution of dividends in the event of a "decrease in the value of the collateral."** On page 5 respondents refer to another alleged inaccuracy. They quote from Section 7.07 of the decree and say:

> "The statement at page 11 of Petitioner's Brief that 'there was nothing in the decree which affirmed the plan relating to this subject matter is inaccurate."

The quotation from the brief is from an *incomplete sentence.* The brief (p. 11) stated:

> "The Plan extended the maturity and changed the rate of interest. It prevented the Trustee from foreclosure or from taking any other action because of the non-payment of interest or principal. *The Plan had no bearing on the question whether the Trustee should pay over the dividends* to the B. & O. *because of the decrease in the capital and surplus of the Reading Company.* **There was nothing in the Plan pertaining to this question.** There was nothing in the petition which invoked the jurisdiction pertaining to this matter and there was nothing in the decree which affirmed the plan relating to this subject matter."

---

* The only part in the Plan dealing with the securities is contained in Article III(a)2. It states "The collateral securing the notes will remain unchanged, except that the provision of the Refunding and General Mortgage Bonds constitutes part of such collateral will be modified as set out under 6, below."

A mere reading of the quoted part of the decree as it appears on page 5 of their brief will convince this court that petitioner's statement *is correct* and that *their statement is incorrect.*

Respondents refer (pp. 3, 4) to the record in Case No. 625 on the former application for certiorari. We have no objection to such reference. It is our contention, however, that *none of these matters are necessary in the instant application for the reason that the matter comes up upon a purely jurisdictional question* and that the record in this petition is ample to present such question particularly in view of the published opinion (34 Fed. Supp. 154).

Due to the fact that counsel have raised the point that the court acquired jurisdiction of the subject matter by its decree and supplied one section of the decree which refers to a supplemental trust deed, it becomes necessary for us to suggest a diminution of the record in connection with our reply brief. We are annexing hereto a motion suggesting a diminution of the record and we refer to such record in this reply.

The "Argument" Is Not Responsive and Is Evasive.

Instead of responding to the petition in the given order respondents have chosen the path of confusion and evasion, and it will be necessary to disentangle the confused argument.

1. The petition raises questions of public or general interest.

Evading Point I in our brief (pp. 10-13) discussing the jurisdiction of the three-judge court to adjudicate the subject matter, respondents urge under Point I (pp. 10-11) that the petition raises "no question of public or general interest." If it be true that the three-

judge court assumed jurisdiction of a subject matter of which it lacked jurisdiction and adjudicated the rights of holders of $50,000,000 in notes then it follows that the question is either of public or of general interest to warrant a review. They state (p. 10) that "the sole question" involved here is the "construction" of a "particular" instrument, and "certainly this court will not concern itself with questions of this type, involving only a construction of a particular instrument." *Such a question is not found under the heading* "Questions Presented" in petitioner's brief (pp. 3-4) nor does such a question appear under the same heading *in respondents' brief* (p. 9). *The question presented here is not the construction of a particular instrument* but the *power* of a court of bankruptcy under its *limited* jurisdiction under Chapter XV to assume jurisdiction (after it approved the relief under that chapter) *to construe terms and provisions of trust instruments which are wholly foreign to the Plan.* It is evident that the "particular" construction of the trust instrument *is not the question* presented but the jurisdiction *to construe any part of* any Trust Indenture. Such a question is of "general application" involving jurisdiction and *not confined to particular constructions.*

The fact that Chapter XV "is no longer an effective Statute" does not warrant an adjudication (by a Special Court created under such Act), without jurisdiction, depriving the aggrieved parties of $1,600,000 in collected dividends and of future dividends to be collected during the next four years. The rights of the petitioner and of the other noteholders of the $50,000,000 note issue are affected by the *void* order and *the fact that the Act expired does not supply validity to the void order.* Parties *may not create an Act or a Court* and obtain relief *without regard to due process of law* and after having accomplished their illegal acts contend that a review

should not be allowed because the act was accomplished. If we are right in our contention that the court had no jurisdiction to pass on the subject matter of the distribution of the dividends because of the decline in the value of the Reading Company stock then this court is faced with the situation that widely scattered noteholders of the $50,000,000 note issue were deprived of their property by a Federal Court without due process of law. *Such a question is always of public or general interest.* The questions as to whether 59b is applicable to bankruptcy as discussed in the petition (pp. 15-16) and in respondents' brief (p. 12) and whether an appeal may be taken from a three-judge court to a Circuit Court of Appeals as discussed in the petition (pp. 17-20) and in respondents' brief (pp. 20-22), as well as the question whether a *permissive* certiorari operates as an *exclusive remedy* as contended by the respondents (p. 21) and as denied by the petitioner (pp. 20-21) *are questions of general interest* regardless of whether or not Chapter XV is in force.

2. The decisions sought to be reviewed are in conflict with decisions of other circuits and with the decisions of the court.

Respondents were unable to justify the application of Rule 59b to the instant case which is in direct conflict with the decisions of this court and of the various circuits, as shown in petitioner's brief (pp. 14-16). Their only justification is (p. 12) that the denial of the motion because of Rule 59b was "only incidentally" involved. They also say that the order "is not a decision or even a dictum." A reference to the order which they quote in their brief contains the following:

> "It is thereupon now ordered * * * that said motion and petition filed August 31, 1940, be and the same is hereby overruled and denied because not timely filed (Federal Rules of Civil Procedure, Rule 59b)."

This part of the order refutes the contention that it was not "a decision" nor "even a dictum." The contention that this is only applicable to Chapter XV and not to the Bankruptcy Act is based on the misconception that Chapter XV is not part of the Bankruptcy Act. No authorities are necessary to show that Chapter XV is a part of the Bankruptcy Act, and if Rule 59b is applicable to Chapter XV then it is applicable to the entire Bankruptcy Act.

Respondents say (p. 13) that the decision of the Fourth Circuit dismissing the appeal on the ground that the exclusive jurisdiction was vested in this court is not in conflict with the decisions of this court or with decisions of other circuits. The Fourth Circuit held (R. 2) that no appeal under *any* circumstances can be taken to a Circuit Court of Appeals *on the ground that a three-judge court constituted a Circuit Court of Appeals.* This is *squarely in conflict* with the decision of the Seventh Circuit in the *Illinois Bell Telephone Company* cases (98 F. (2) 930, and 102 F. (2) 58). They seek to distinguish the decision of the Seventh Circuit on the ground that the appeal there involved "subsequent orders" entered by a three-judge court where the contention was that the orders were entered without jurisdiction or without power. This very question is involved in this case.

3. The decision of the Special Court that it had jurisdiction to determine the disposition of the dividends cannot be sustained under any theory.

It is urged (p. 15) that petitioner "is in error in its statement (Brief 13) that it was not necessary to construe the terms of the decree." On page 5 of their brief they quoted the pertinent part from Section 7.07 of the decree which is as follows:

"is hereby authorized and directed * * * to pay over to the B. & O. *all dividends* and interest which shall have been received by said Trustees from August 1, 1939, to the time of such payment to the B. & O. on the securities held by said Trustee under said Indenture *which would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends or interest were so received* * * *." (Italics theirs.)

We also refer this court to Section 7.05 of the Decree which is part of the record in Case 625 to which they referred (p. 3), and we quote the following:

"SECURED NOTES

SECTION 7.05. The form and terms of a proposed Supplemental Indenture dated January 1, 1940, between the B. & O. and said Trustee under said Indenture securing the Secured Notes, which proposed Supplemental Indenture has been filed in the record of this proceeding as Exhibit No. 74, and the respective forms and terms of the Extension Agreements, Notations and New Coupons therein set out are hereby approved. Said Supplemental Indenture, Extension Agreements, Notations and New Coupons are consistent with the Plan and this Decree and necessary or desirable for the due and proper effectuation of the Plan and this Decree."

By the annexed motion showing a diminution of the record *we have supplied the material portion of the Supplemental Indenture which that decree approved.* That Supplemental Trust Indenture approved under the decree referred to in Section 3 to the change *in so far as it related to the defaults in interest or principal.* (Compare this Section 3 with Section 2 of Article Five of the original Trust Indenture in the "appendix" to Respondents' brief.) Section 4 of the Supplemental Trust Indenture stated: *"Except as expressly provided in this Sup-*

plemental Indenture the rights and powers of the Trustee with respect to the pledged securities, and the covenants, conditions and agreements relating thereto on the part of the company *shall be as provided in the note indenture,* with the same force and effect as if herein set forth in full."

It is apparent from the foregoing that *neither under the decree nor under the Supplemental Indenture* which the decree approved was there anything pertaining to the disbursement of dividends because of the decrease in the value of the Reading collateral. The decree authorized the payment of the dividends the same as if *"no default by the B. & O. was made,"* but the condition in the original Trust Indenture and in the Supplemental Trust Deed not to distribute dividends when the collateral was less than $225,000,000 *did not depend on a default of the B. & O.* The Trustee was prohibited from distributing dividends if the collateral was less than $225,000,000, independent of any default. It is apparent that the assumption of jurisdiction because it was necessary to construe the terms of the decree cannot be sustained.

They dispose of the point that the Special Court was without jurisdiction of the collateral in the possession of the Mortgage Trustee, by citations under Section 77 of the Bankruptcy Act. These decisions have no application to Chapter XV where the jurisdiction was *limited.* Section 77, like Section 77B, deals with *general reorganizations* and, of course, pledged securities in which the Debtor has an interest may be subject to the powers of the court administering such reorganization, but Chapter XV is not a reorganization statute. It is confined to *temporary relief* and deals only with *subject matters which are included in a Plan.* The Plan did *not include distribution of dividends on the collateral in the event the value of the collateral was less than $225,000,-*

000. It follows that it had no jurisdiction of this subject matter. The limited scope of the jurisdiction as distinguished from jurisdiction under reorganizations was *recognized by the Special Court in its opinion* (34 F. Supp. 154, 160).

In answer to the point in petitioner's brief (p. 10) that the Special Court had no jurisdiction of the subject matter of the Trustee's petition because the construction of the Trust Indenture was never submitted to the Interstate Commerce Commission nor to the noteholders and no approval or assent was ever obtained from them, they say (p. 17) that this was only "a question of law as to the meaning of the provision of the Indenture" and that it did not depend on questions of facts upon which either the Commission or the noteholders were to act. A reference to the decision of the Special Court (34 F. Supp. 154, 162) will refute this contention. *It shows that there were factual matters upon which the court passed.* Respondents say that petitioner's argument that the jurisdiction to construe the terms of the Trust Indenture belongs exclusively to the Equity Courts, overlooked the fact that Chapter XV conferred jurisdiction of the Equity Court on the Special Court. They overlooked that *this jurisdiction was limited to the scope of the Plan, as pointed out in the opinion of the Special Court* (34 F. Supp. 154, 160).

4. Petitioner has certified the record as made up by the respondents, and the record is sufficient to present the jurisdictional question.

Respondents complain that petitioner failed to certify a record sufficient to enable this court to pass "on the construction by the Special Court of its decree." The merits of the construction are not at issue, and the only issue is the *power to construe.* The petition (p. 2) re-

ferred to the opinion of the Special Court (34 F. Supp. 154) which *contains the entire subject matter necessary for review.* Counsel have also availed themselves of the record in Case No. 625 on the former application for certiorari. If there was anything additional they desired they could have moved the court and suggested a diminution of the record. Besides, *it is they who made the record.* They filed a motion in the Fourth Circuit and docketed the case (R. 3) and made up the record upon which the Fourth Circuit passed on the jurisdictional question. *If that record was good for them to raise a jurisdictional question it is equally sufficient for the jurisdictional question on our petition.*

5. The decision of the Fourth Circuit that this court was vested with the exclusive jurisdiction under Chapter XV affects federal appellate procedure generally.

Not a single case is cited by counsel on the point that where a *permissive* discretionary writ of certiorari is allowed that this remedy is *exclusive* and constitutes a denial of the right to appeal. Each case upon which they rely refers to the *right of appeal* but not to a *permissive certiorari.* The decision of the Fourth Circuit cannot be reconciled with the decision of the Seventh Circuit notwithstanding the great labor of the respondents to find distinctions. The question whether or not a decision from a three-judge court may be reviewed by a Circuit Court of Appeals and whether a permissive review by certiorari excludes a right of appeal is of such great and general importance to the entire system of judicial review as to warrant the issuance of the writ.

For the foregoing reasons we urge that the Writ be awarded.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioner.